



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

AUG 23 2019

Marc E. Elias, Esq.
Perkins Coie LLP
700 13th Street, NW, Suite 600
Washington, D.C. 20005

RE: MUR 7154
Hillary for America
Strickland for Senate

Dear Mr. Elias:

On October 20, 2016, the Federal Election Commission notified your clients, Hillary for America and its treasurer, and Strickland for Senate and its treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On August 20, 2019, the Commission found, on the basis of the information in the complaint, and information provided by respondents, that there is no reason to believe Hillary for America and Elizabeth Jones in her official capacity as treasurer and Strickland for Senate and Michael J. Johrendt in his official capacity as treasurer violated 52 U.S.C. § 30116(f) by accepting an excessive contribution. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Christine C. Gallagher, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in dark ink, appearing to read "Mark Allen".

Mark Allen
Assistant General Counsel

Enclosure
Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5 **RESPONDENTS¹:** Ohio Democratic Party and Fran Alberty **MUR 7154**
6 in her official capacity as treasurer
7 Albertson for Congress and Esther Boykin
8 in her official capacity as treasurer
9 Strickland for Senate and Michael J. Johrendt
10 in his official capacity as treasurer
11 Beatty for Congress and Jeffrey A. Ruppert
12 in his official capacity as treasurer
13 Hillary for America and Elizabeth Jones
14 in her official capacity as treasurer
15 Wharton for Congress and George Wharton
16 in his official capacity as treasurer
17

18 **I. INTRODUCTION**

19 This matter was generated by a complaint filed with the Federal Election Commission
20 pursuant to 52 U.S.C. § 30109(a)(1) alleging that the Ohio Democratic Party ("ODP") was
21 required by the Federal Election Campaign Act of 1971, as amended (the "Act"), to include
22 appropriate disclaimers on a brochure it produced and distributed in October 2016, featuring
23 the photographs and names of five federal candidates endorsing numerous state and local
24 candidates in the November election, and on three sample ballots displayed on its website, for
25 download and further distribution by viewers, listing various slates of Democratic federal,
26 state, and local candidates on the November 8, 2016 ballot.²
27 In addition, the Complaint alleges that the brochure is a coordinated communication between
28 ODP and each of the five federal candidates named therein, and that some portion of the costs

¹ While Fran Alberty is Ohio Democratic Party's current treasurer, Zach West was its treasurer at the time of the events. See Ohio Democratic Party Amended Statement of Organization (Nov. 17, 2018). Similarly, while Elizabeth Jones is the current treasurer of Hillary for America, Jose Villareal was its treasurer at the time of the events. See Hillary for America Amended Statement of Organization (May 29, 2018). See also *Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings*, 70 Fed. Reg. 3 (January 3, 2005).

² Compl. (Oct. 18, 2016).

associated with the mailing should be attributed as an in-kind contribution to each of those candidates.³ ODP, which is registered with the Commission as a state party committee,⁴ claims that it was in compliance with disclaimer requirements and all the respondents deny that the brochure was coordinated.⁵

Based on the allegations of the complaint, the response, and other available information, there is no reason to believe that ODP violated 52 U.S.C. § 30120 with respect to the brochure and sample ballots, and no reason to believe ODP violated 52 U.S.C. § 30116(a)(2)(A) or that the candidate committee Respondents violated 52 U.S.C. § 30116(f) with respect to alleged coordination.

II. FACTUAL AND LEGAL ANALYSIS

A. The Brochure Did Not Require a Federally Compliant Disclaimer

The two-page ODP brochure, which the Complainant alleges she received in the mail, includes the names and photographs of five federal candidates on the general election ballot in November 2016 — Hillary Clinton, Ted Strickland, Joyce Beatty, Ed Albertson, and Scott Wharton — above the words “Join us in endorsing your state and local Democratic candidates.”⁶

³ *Id.*

⁴ See Ohio Democratic Party Amended Statement of Organization (Nov. 17, 2018).

⁵ ODP Resp. at 2-4 (Dec. 12, 2016); Albertson for Congress Resp. at 1-2 (Nov. 9, 2016); Strickland for Senate Resp. at 2-3 (Dec. 12, 2016); Hillary for America Resp. at 2-3 (Dec. 14, 2016); Beatty for Congress Resp. at 2 (Dec. 13, 2016); Wharton for Congress Resp. at 1 (Jan. 10, 2018). On December 28, 2016, Wharton for Congress filed a termination report. See FEC Form 3, Wharton for Congress, (Dec. 28, 2016). On January 5, 2017, the Reports Analysis Division accepted the termination. See Letter from Chris Jones, Campaign Finance Analyst, FEC, to George R. Wharton, Treasurer, Wharton for Congress (Jan. 5, 2017).

⁶ See Compl. Ex. A. The brochure does not identify the offices sought by the federal candidates, which are, respectively, President, U.S. Senate in Ohio, and U.S. House in Ohio’s 3rd, 12th and 15th Congressional Districts.

1 Below those words are the names of and offices sought by 31 state and local candidates on the
2 November ballot. The bottom of the first page contains the names and photographs of candidates
3 for prosecuting attorney and recorder, with the words: "Standing up for Franklin County." The
4 second page of the brochure contains the names and photographs of two candidates for the Ohio
5 Supreme Court. One of the accompanying captions states "Ohio Democrats are Stronger
6 Together. Ohio needs experienced and fair judges." Another is "Don't Think Twice Vote
7 O'Donnell and Rice for Ohio Supreme Court." The brochure also exhorts the reader to vote for
8 specific local "Issues," apparently ballot measures, and contains the words "Vote early or on
9 ELECTION DAY NOV. 8. OhioTogether.com." The second page also urges readers to: "Vote
10 early or on Election Day Nov. 8." The brochure does not contain a federally compliant
11 disclaimer, although the return address of the brochure contains ODP's name and street address,
12 and the bulk postage stamp indicates that ODP paid the postage.⁷

13 The Complaint asserts that the brochure required a disclaimer because it is a "public
14 communication" distributed by a political committee.⁸ ODP contends that the brochure was
15 exempt from federal disclaimer laws because it did not constitute "Federal election activity"
16 under the Act.⁹

⁷ The brochure also states: "Disclaimer: ODP will never charge you for text alerts, but your carrier's msg and data rates may apply." *Id.*

⁸ Compl. at 2-3.

⁹ ODP Resp. at 1-3. The candidate committees, Strickland for Senate, Hillary for America, Albertson for Congress, Beatty for Congress, and Wharton for Congress, each deny paying for the brochure or authorizing it; on that basis, they each assert that they are not responsible for any potential disclaimer violations. Strickland for Senate Resp. at 1-2; Hillary for America Resp. at 1-2; Beatty for Congress Resp. at 2-4; Albertson for Congress Resp. at 1-2; Wharton for Congress Resp. at 1.

1 The Act and Commission regulations require disclaimers on all "public
2 communications," including mass mailings, by any person that expressly advocates the election
3 or defeat of a federal candidate or that solicits any contribution; all "electioneering
4 communications" by any person; and all "public communications" by a "political committee."¹⁰
5 A disclaimer on a printed communication, such as a mailer, must be in a box and state whether
6 the communication is authorized by a candidate, candidate's committee, or its agents, and
7 identify the person who paid for the communication.¹¹ ODP's brochure did not contain such a
8 disclaimer.

9 ODP's brochure qualifies as a "public communication" because it is a "mass mailing," a
10 fact not disputed by ODP.¹² Thus, the brochure would require a disclaimer if ODP is a "political
11 committee" within the meaning of the disclaimer provision.¹³ The Commission has determined,
12 however, that "the disclaimer provisions of the Act do not apply to purely non-Federal activity
13 conducted by a state or local political party committee's non-Federal component and paid for
14 with non-Federal funds" because such activity by a party committee is not activity of a "political

¹⁰ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a). The term "public communication" includes mass mailings, which in turn are defined as mailings "by United States mail . . . of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period." 52 U.S.C. § 30101(22), (23); 11 C.F.R. §§ 100.26, 100.27.

¹¹ 52 U.S.C. § 30120(a)(3); 11 C.F.R. § 110.11(b)(3). A disclaimer on a printed communication must be contained in a printed box, be of sufficient type size to be readable, and be printed with a reasonable degree of color contrast between the background and the disclaimer statement. 52 U.S.C. § 30120(c)(1), (2), (3); 11 C.F.R. § 110.11(c)(2)(i), (ii), (iii).

¹² See ODP Resp. at 2-5. The brochure, as printed material, is not within the definition of "electioneering communication" and, therefore, not within the electioneering communication disclaimer provision. See 52 U.S.C. § 30104(f)(3) and 11 C.F.R. § 100.29 (defining "electioneering communication" as broadcast, cable, or satellite communication meeting certain specified requirements).

¹³ The brochure would also require a disclaimer if it solicits any contribution, though the brochure cannot be fairly read as soliciting any contribution. See 11 C.F.R. § 110.11(a)(3).

committee” within the scope of the disclaimer provision.¹⁴ A state party committee communication that is “wholly in connection with a non-federal election” is nevertheless subject to the disclaimer rules if it constitutes “federal election activity” (“FEA”) or “other Federal-related activity requiring Federal funding.”¹⁵ ODP asserts that the brochure was “properly paid for solely with non-federal funds,”¹⁶ which appears to be corroborated by ODP’s state and federal disclosure reports.

1. The Brochure is Not Federal Election Activity because it does Not Promote, Support, Attack, or Oppose a Federal Candidate

One way ODP’s communication would be considered FEA, and thus require a disclaimer as a public communication of a political committee, is if it refers to a clearly identified candidate for federal office and promotes, supports, attacks, or opposes a candidate for that office (“PASO”).¹⁷ The Commission has stated that a public communication clearly identifying a federal candidate who is endorsing a state or local candidate does not necessarily PASO the endorsing federal candidate. In Advisory Opinion 2003-25 (Weinzapfel), the Commission

¹⁴ Statement of Reasons, Comm’rs. Toner, Lenhard, Mason, Walther, Weintraub & von Spakovsky at 5, MUR 5600 (Michigan Democratic State Central Committee) (agreeing with the OGC’s coordination and federal election activity analyses, but disagreeing with the recommendation to find disclaimer violation for state party committee’s non-federal component’s non-federal disbursements for mass mailing in which federal candidate endorsed state candidate) (“MUR 5600 SOR”); *see also* 11 C.F.R. § 102.5(a)(i), (ii) (requiring state party committees that finance political activity in connection with both federal and non-federal elections, and that qualify as political committees, to establish either a dedicated federal account that is treated as a “separate Federal political committee,” which must comply with the requirements of the Act, or establish a political committee that receives only contributions subject to the prohibitions and limitations of the Act, for use in both federal and non-federal elections).

¹⁵ MUR 5600 SOR at 3-4; *see also* 52 U.S.C. § 30101(20) (defining FEA); 11 C.F.R. § 100.24 (same); *cf.* 11 C.F.R. § 300.32 (describing that activity for which state party committee must use federal funds and that non-federal activity for which state party committee may use federal or non-federal funds).

¹⁶ ODP Resp. at 2.

¹⁷ *See* 52 U.S.C. § 30101(20)(A)(iii); 11 C.F.R. § 100.24(b)(3).

1 concluded that a television advertisement, in which an incumbent candidate for U.S. Senate, who
2 was identified as Senator in written words on screen, appeared and spoke his endorsement of a
3 local candidate, did not PASO that federal candidate. The Commission stated, “[u]nder the plain
4 language of [the Act], the mere identification of an individual who is a Federal candidate does
5 not automatically promote, support, attack, or oppose that candidate.”¹⁸ Similarly, in the
6 enforcement context, in MUR 5600 (Michigan Democratic State Central Committee), the
7 Commission approved OGC’s recommendations that a state party mailer was not required to be
8 paid with federal funds because it did not PASO a federal candidate merely by containing a
9 quotation from U.S. Rep. Dingell, who at the time was a Democratic candidate for re-election in
10 the 15th Congressional District in Michigan, endorsing a state candidate and a photo of Dingell
11 and the state candidate together.¹⁹

12 We conclude that the five federal candidates were included in the ODP brochure in
13 connection with an endorsement and the brochure did not PASO any federal candidate. The five
14 federal candidates are identified in the brochure by photograph and name, but the brochure
15 includes no information about these candidates other than their identification. It does not

¹⁸ Advisory Op. 2003-25 at 3-5. In subsequent advisory opinions, the Commission concluded that public communications did not PASO a federal candidate when the communication does not add any additional statement that could be construed as support or promotion of the federal candidate, and the communication emphasizes state or local candidates. *See, e.g.*, Advisory Op. 2009-26 (Coulson) (concluding, in respect to the identification of a candidate by name and picture on a mass mailing, that “the mere identification of an individual who is a Federal candidate does not, in itself, promote, support, attack, or oppose that candidate”); Advisory Op. 2007-21 (Holt) (considering federal candidate’s name and title “Honorary Chairman” contained on state campaign’s letterhead and other public communications). In one opinion, the Commission reached this decision in the context of a communication that included an exhortation to vote. Advisory Op. 2007-34 (Jackson, Jr.) at 2 (advertisement contained the words “Vote February 5th,” the date of the primary election of both the endorsing federal candidate and the state candidate in question).

¹⁹ *See* MUR 5600 First Gen. Counsel’s Rpt. at 3-5; Certification, MUR 5600 (Apr. 18, 2006); MUR 5600 SOR at 1-2; *see also* MURs 5387/5446 (Welch for Wisconsin) (radio advertisement that contained endorsement by federal candidate without mentioning federal candidacy did not PASO the federal candidate).

1 mention their federal offices sought and neither praises nor criticizes the federal candidates;
2 indeed, the brochure says nothing about the federal candidates at all, other than the presentation
3 of their names and images. Their photographs are of approximately equal size to the
4 photographs of the state candidates contained on the same page, and are smaller than the two
5 photographs of the state judicial candidates on the second page of the brochure. The names of 31
6 other state and local candidates and offices sought appear along with exhortations to vote on
7 local issues, and, while the qualifications of the photographed state candidates are listed, the
8 brochure makes no representations about the qualifications of the federal candidates. The
9 general exhortation to vote, "Vote early or on Election Day Nov. 8," appears below the list of 31
10 state and local candidates, not directly below the photographs and names of the federal
11 candidates. Taken as a whole, the brochure does not contain any statements that could be
12 construed as support or promotion of any of the referenced federal candidates. Just as the
13 advertisements discussed above featuring a federal candidate's endorsement of a local candidate
14 did not PASO the federal candidate, the ODP brochure, featuring the photographs and names of
15 the federal candidates with the statement "Join us in endorsing your state and local Democratic
16 candidates," does not PASO the endorsing federal candidates.

17 2. The Brochure is Not Federal Election Activity because it is Not GOTV

18 The brochure would also be considered FEA, and thus require a disclaimer as a public
19 communication of a political committee, if it constitutes get-out-the-vote activity ("GOTV").²⁰
20 GOTV generally includes any activity that encourages or urges potential voters to vote, including
21 informing voters of polling locations or hours and providing transportation to the polls.²¹ The

²⁰ See 52 U.S.C. § 30101(20)(A)(ii); 11 C.F.R. § 100.24(b)(2)(iii).

²¹ 11 C.F.R. § 100.24(a)(3)(i).

1 Commission regulations state that “[a]ctivity is not get-out-the-vote activity solely because it
2 includes a brief exhortation to vote, so long as the exhortation is incidental to a communication,
3 activity, or event.”²² Examples of communications that are not GOTV include: (1) “[a] mailer
4 praises the public service record of mayoral candidate X and/or discusses his campaign platform.
5 The mailer concludes by reminding recipients, ‘Vote for X on November 4th,’” and (2) “[a]
6 phone call for a State party fundraiser [that] gives listeners information about the event, solicits
7 donations, and concludes by reminding listeners, ‘Don’t forget to vote on November 4th.’”²³

8 We conclude that the brochure is not GOTV because it contains only a brief exhortation
9 to vote, and the exhortation is incidental to the communication.²⁴ The statements in ODP’s
10 brochure are similar to the statements the Commission regulations specify are not GOTV. For
11 instance, on the first page of the brochure: “Vote early or on ELECTION DAY NOV. 8” is
12 materially similar to the regulatory example cited above which reminds the reader to vote on a
13 specific day.²⁵ The statement on the second page of the brochure: “Don’t Think Twice Vote
14 O’Donnell and Rice for Ohio Supreme Court” is materially similar to the other example urging
15 the reader to vote for a specific candidate.²⁶ Moreover, the majority of the space in the brochure
16 is dedicated to promoting state and local candidates, and discussing their qualifications,
17 platforms, and local issues, and the statements urging the readers to vote constitute a single

²² 11 C.F.R. § 100.24(a)(3)(ii); *see also* Definition of Federal Election Activity, 75 Fed. Reg. 55,257, 55,263-65 (Sept. 10, 2010) (“FEA E&J”).

²³ 11 C.F.R. § 100.24(a)(3)(ii)(A)-(B).

²⁴ *See* FEA E&J at 55,263-65; 11 C.F.R. § 100.24(a)(3)(ii).

²⁵ *See* 11 C.F.R. § 100.24(a)(3)(ii)(B).

²⁶ *See* 11 C.F.R. § 100.24(a)(3)(ii)(A).

phrase on each page and occupy minimal space, thus supporting the conclusion that they are incidental.²⁷

3. The Brochure Does Not Appear to Otherwise Constitute Federal-Related Activity Requiring Federal Funding so as to Require a Disclaimer

The ODP brochure neither PASOs a federal candidate nor is GOTV and does not otherwise constitute FEA.²⁸ The brochure also does not appear to fall within the express advocacy scope provision of the disclaimer rules.²⁹

Moreover, ODP's brochure does not appear to be a slate card subject to the disclaimer rules at 110.11(e)³⁰ or any other provision in the scope of the disclaimer rules other than for

²⁷ See FEA E&J at 55,264-65; see also 11 C.F.R. § 100.24(a)(3)(ii)(A), (B).

²⁸ FEA also includes voter registration activity 120 days before a federal election; voter identification; generic campaign activity in connection with an election in which a candidate for federal office appears; and services provided during any month an employee of a state party committee spends more than 25 percent of that individual's time in connection with a federal election. 52 U.S.C. § 30101(20)(A)(i), (ii), (iv); 11 C.F.R. § 100.24(b)(1), (2)(i) and (ii), (4). ODP asserts that the brochure constitutes none of these aspects of FEA, and we agree: ODP's brochure is not voter registration activity because it does not "assist, encourage, or urge potential voters to register to vote;" does not constitute generic campaign activity because it promotes candidates for non-federal office; does not meet the definition of voter identification because it does not seek to acquire information about potential voters or obtain voter lists; and is a communication, not a service provided by a state party employee. See ODP Resp. at 2-3; FEA E&J at 55,260; 52 U.S.C. § 30101(21); 11 C.F.R. §§ 100.24(b)(1), 100.24(b)(2)(i), 100.24(b)(4), 100.25.

²⁹ See 11 C.F.R. § 110.11(a)(2); 11 C.F.R. § 100.22 (a communication "expressly advocates" the election or defeat of a clearly identified candidate when, among other things, it contains campaign slogans or individual words that "in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates" or when, taken as a whole and with limited reference to external events, it "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates"). We conclude that because the ODP brochure does not meet the PASO standard, see discussion *supra* Section II.A.1, it does not meet the more restrictive express advocacy standard. See 52 U.S.C. § 30101(20)(A)(iii) and 11 C.F.R. § 100.24(b)(3) (providing that a communication may PASO a candidate whether or not the communication expressly advocates the election or defeat of a federal candidate); see also Coordinated Communications, 74 Fed. Reg. 53,893, 53,900 (Oct. 21, 2009) (proposing, in response to court decision requiring more inclusive coordination content standard than express advocacy, PASO content standard, on basis that "express advocacy is a subset of PASO") (not promulgated in final rules).

³⁰ Section 110.11(e) specifies that political party committees must comply with applicable disclaimer requirements for certain "exempt activity" communications, including slate cards, though need not include candidate authorization statements in those disclaimers. 11 C.F.R. § 110.11(e); see also 11 C.F.R. §§ 100.80, 100.140 (exempting from definitions of "contribution" and "expenditure," respectively, a slate card, sample ballot, or other printed listing of three or more candidates for public office for which an election is held in the state in which the political party committee is organized, though it may or may not be FEA); Prohibited and Excessive Contributions: Non-federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,068-069 (July 29, 2002). The Statement of Reasons in

1 public communications by a political committee. Finally, as explained further below, ODP's
2 brochure does not appear to be coordinated with any federal candidate so as to require federal
3 funds for any resulting contribution. In sum, ODP's brochure appears to be purely non-federal
4 activity by a state party committee and, appears to be paid for from ODP's non-federal
5 account,³¹ thus the communication appears to be exempt from the Act's disclaimer requirements,
6 consistent with the Commission's conclusions in MUR 5600.

7 Therefore, there is no reason to believe that the Ohio Democratic Party and Fran Alberty
8 in her official capacity as treasurer violated 52 U.S.C. § 30120 with respect to using the
9 appropriate disclaimers on the brochure..

10 **B. The Sample Ballots Contained the Required Disclaimer**

11 The three sample ballots attached to the Complaint, each one-sided, include the heading:
12 "Ohio Democrats are Stronger Together" and "Ohio Democratic Party Official Sample Ballot."³²

MUR 5600, which considered a communication listing less than three candidates, did not address whether a political party committee disbursing non-federal funds for a slate card or similar mailing would be required to include a disclaimer on such a public communication. Nonetheless, ODP's brochure does not appear to fall within the definition at 11 C.F.R. § 100.140. See Factual and Legal Analysis at 3, MUR 6088 (Haverford Township Democratic Committee) (materials subject to the slate card exemption may only include basic candidate voting information, and publications that go beyond the informational limitations and include language criticizing opponents, additional biographical information, descriptions of candidates' positions on issues, or party philosophy do not qualify for the exemption). ODP's brochure criticizes local judicial candidates' opponents; and includes state and local candidate biographical information. Compl. Ex.A.

³¹ ODP's reports filed with the Ohio Secretary of State disclose disbursements for "mailing" during the time the brochure was distributed, October 2016, and its reports filed with the Commission do not disclose any such payments during that time. See ODP 2016 Post General Rpt (Dec. 16, 2016) [https://www6.sos.state.oh.us/ords/f?p=CFDISCLOSURE:39::NO:RP:P39_ENTITY_ID:P39_LISTTYPE:5001:simple;see also Third Amended Post-General 2016 Rpt. \(Sept. 25, 2017\), Amended Pre-General Rpt. \(June 6, 2017\). https://www.fec.gov/data/committee/C00016899/?cycle=2016&tab=filings](https://www6.sos.state.oh.us/ords/f?p=CFDISCLOSURE:39::NO:RP:P39_ENTITY_ID:P39_LISTTYPE:5001:simple;see%20also%20Third%20Amended%20Post-General%202016%20Rpt.%20(Sep%2025%202017)%20Amended%20Pre-General%20Rpt.%20(June%206%202017).https://www.fec.gov/data/committee/C00016899/?cycle=2016&tab=filings). The Committee's reporting at both the state and federal level is consistent with its assertion that the brochure was paid for "exclusively with non-federal funds." See OPD Resp. at 3.

³² See Compl. Exs. B, C, D.

1 The first sample ballot contains photographs of Hillary Clinton, U.S. Representative Marcy
2 Kaptur, and Barack Obama; the second, photographs of Clinton and Tim Kaine; and the third, a
3 photograph of U.S. Representative Joyce Beatty.³³ The ballots list the names of and offices
4 sought by federal, state, and local candidates.³⁴ The Complaint asserts that the sample ballots are
5 publicly available on ODP's website, which contains a disclaimer; the Complaint alleges,
6 however, that "viewers are encouraged to download the sample ballot, post it on Facebook or
7 tweet it" and when so printed, posted to Facebook, or tweeted, the sample ballots contain no
8 disclaimer.³⁵ The Complaint further asserts that sample ballots were "issued" by ODP. While
9 the Complaint asserts that it attached "true and accurate copies of the several sample ballots," it
10 does not clearly set forth how they were obtained, *e.g.*, whether they were printed from ODP's
11 website, or if ODP "issued" them in printed form.³⁶

12 ODP asserts that, as internet communications, the sample ballots appearing on its website
13 did not require disclaimers, and that its website contained the appropriate disclaimer.³⁷ ODP
14 further claims that it "only encouraged individuals to use these documents for their personal use,
15 or to place them on their personal social networking websites (specifically, Facebook or

³³ *Id.*

³⁴ *Id.*

³⁵ Compl. at 2.

³⁶ *Id.*

³⁷ ODP Resp. at 1, 6, Attach. 5.

1 Twitter).”³⁸ ODP further asserts that it created and distributed separate versions of each sample
2 ballot, each containing the appropriate disclaimer.³⁹

3 Sample ballots authorized by a political party committee must comply with the Act’s
4 disclaimer requirements, but need not state whether the communication is authorized by a
5 candidate or authorized committee.⁴⁰ The Commission’s regulations provide that a required
6 “disclaimer need not appear on the front or cover page of the communication as long as it
7 appears within the communication.”⁴¹ All websites of political committees available to the
8 general public must include a disclaimer.⁴²

9 The one-sided sample ballots attached to the Complainant contained no disclaimer; the
10 two-sided copies of the sample ballots provided by ODP, which it asserts were printed and
11 distributed, contain a disclaimer, on the second side, stating that they were paid for by ODP.⁴³
12 Therefore, to the extent that the Complaint is premised on sample ballots printed and distributed
13 by ODP, it appears that the printed and distributed sample ballots contained the appropriate
14 disclaimer. Further, to the extent that the Complaint is premised on sample ballots ODP posted

³⁸ *Id.* at 6..

³⁹ *Id.* at 6, Attach. 2, 3, 4. ODP attaches to its response copies of two-sided printed sample ballots, with the second side of the ballot including a disclaimer in a printed box stating: “Paid for by the Ohio Democratic Party,” or “Paid for by the Ohio Democratic Party, David Pepper, Chairman.” *Id.* at 6, Attach. 2, 3, 4.

⁴⁰ 11 C.F.R. §§ 110.11(e), 100.140.

⁴¹ 11 C.F.R. § 110.11(c)(2)(iv) (also noting exception for communications such as billboards, that contain only a front face, which is not applicable here).

⁴² 11 C.F.R. § 110.11(a)(1); *see also* Advisory Op. 1995-09 (NewtWatch) at 2.

⁴³ *See* ODP Resp. Attach. 2, 3, 4.

1 on its own website, images on websites do not have separate disclaimer requirements, and the
2 ODP website, generally, contained the appropriate disclaimer.⁴⁴

3 Therefore, there is no reason to believe that the Ohio Democratic Party and Fran Alberty
4 in her official capacity as treasurer violated 52 U.S.C. § 30120 with respect to using the
5 appropriate disclaimers the sample ballots.

6 **C. The Brochure is not a Coordinated Communication**

7 The Complaint alleges that the brochure purports to be a communication from the five
8 named federal candidates and paid for by ODP, and thus appears to be a coordinated
9 communication between ODP and each federal candidate; as such, the Complaint alleges that a
10 portion of the costs associated with the brochure appears to be an in-kind contribution from
11 ODP to each federal candidate.⁴⁵ Respondents deny coordinating the brochure, and the
12 responding federal candidate committees each deny that they authorized the brochure and assert
13 that the safe harbor provision for endorsing federal candidates applies.⁴⁶

⁴⁴ ODP Resp. Attach. 5. As for third parties' use of ODP's sample ballots on the internet, the available record does not indicate that ODP placed the ballots on another person's website for a fee and, therefore, such ballots are not "public communications" by ODP within the scope of the disclaimer requirement. See 11 C.F.R. §§ 100.26 (defining "public communication"), 110.11(a)(1); see also Advisory Op. 2011-14 (Utah Bankers Association) (concluding that further disclaimers to email solicitations and website are not necessary, even if asked to be forwarded). Further, the Commission has concluded that internet pages do not constitute "printed communications;" therefore, the additional disclaimer requirements for printed disclaimers, including the "printed box" requirement, do not apply to campaign websites. See Statement of Reasons, Comm'rs. Weintraub, Walther, Lenhard, Mason, Toner and von Spakovsky at 4, MUR 5526 (Graf for Congress); see also Factual and Legal Analysis at 2-3, MUR 6591 (Friends of Tom Stilson); Factual and Legal Analysis at 6-9, MUR 5887 (Republican Main Street Partnership).

⁴⁵ Compl. at 3.

⁴⁶ ODP Resp. at 4; Strickland for Senate Resp. at 1-3; Hillary for America Resp. at 1-3; Beatty for Congress Resp. at 2-4; Albertson for Congress Resp. at 1-2; Wharton for Congress Resp. at 1. One candidate committee, Albertson for Congress, acknowledges it provided Albertson's photograph to ODP and that it was used in the brochure. Albertson for Congress Resp., Edward G. Albertson Aff. ¶¶ 4, 7 (Nov. 5, 2016); Esther Boykin, Treasurer Aff. ¶ 7 (Nov. 4, 2016); Albertson for Congress Resp. Ex. A. This use could raise an issue of ODP's republication of Albertson's campaign material, thus constituting a contribution to Albertson. See 11 C.F.R. § 109.23. But the Albertson photograph is one small photograph in a brochure of many photographs and the brochure primarily focuses on state and local candidates and issues. Thus, the republished photograph appears to be of

1 Contributions from a state party committee to a candidate committee are limited to a total
2 of \$5,000 per election, and candidates and political committees are prohibited from knowingly
3 accepting contributions in excess of the Act's limits; party committees may make "party
4 coordinated communications" subject to a higher limit.⁴⁷ Under the Act, expenditures that are
5 coordinated with a candidate are treated as contributions to the candidate.⁴⁸ The Commission
6 has promulgated certain exceptions to the definitions of "party coordinated communication" and
7 "coordinated communication," including that a public communication in which a federal
8 candidate endorses another candidate for federal or non-federal office is not a coordinated
9 communication as to the endorsing federal candidate unless the communication PASOs the
10 endorsing candidate or another candidate who seeks election to the same office as the endorsing
11 candidate.⁴⁹ In creating a safe harbor for endorsements, the Commission stated that the
12 coordinated communications regulation identifies communications made for the purpose of
13 influencing a federal election, whereas endorsements "are not made for the purpose of
14 influencing the endorsing . . . candidate's own election."⁵⁰ It also concluded that when the safe

de minimis value. See Factual and Legal Analysis at 7-8, MUR 6840 (All Citizens for Mississippi) (dismissing a republication allegation due to its *de minimis* value).

⁴⁷ 52 U.S.C. § 30116(a)(2)(A), (f). The Act grants state party committees authority to also support their general election candidates with coordinated expenditures subject to certain limits, including through assignment by a national party committee. See 52 U.S.C. § 30116(d); 11 C.F.R. § 109.32. In 2016, the coordinated limit to support House candidates in states with more than one congressional district was \$48,100; the coordinated limit to support Ohio Senate candidates was \$863,800; and the limit for presidential candidates was \$23,821,100. See https://www.fec.gov/resources/cms-content/documents/fedreg_notice_2016-01.pdf.

⁴⁸ 52 U.S.C. § 30116(a)(7)(B).

⁴⁹ 11 C.F.R. §§ 109.37(a)(3), 109.21(g)(1).

⁵⁰ Coordinated Communications. 71 Fed. Reg. 33,190, 33,202 (June 8, 2006).

harbor applies, the endorsing candidate may be involved in the development, content, timing, frequency, means or mode of the communication.⁵¹

The endorsement safe harbor appears to apply here because, as discussed above, the ODP brochure does not appear to PASO any of the five federal candidates pictured and named in the brochure or any other candidate running for the offices each sought.⁵² Accordingly, the brochure appears to be exempt from the definition of “coordinated communication.”

Therefore, there is no reason to believe that the Ohio Democratic Party and Fran Alberty in her official capacity as treasurer violated 52 U.S.C. § 30116(a)(2) by making a coordinated expenditure for the brochure, or that Albertson for Congress and Esther Boykin in her official capacity as treasurer, Strickland for Senate and Michael J. Johrendt in his official capacity as treasurer, Beatty for Congress and Jeffrey A. Ruppert in his official capacity as treasurer, Hillary for America and Elizabeth Jones in her official capacity as treasurer, or Wharton for Congress and George Wharton in his official capacity as treasurer violated 52 U.S.C. § 30116(f) by accepting an excessive contribution.

⁵¹ *Id.*

⁵² See 11 C.F.R. §§ 109.37(a)(3), 109.21(g); discussion at Section II.A.1. *supra*; Factual & Legal Analysis at 4-9, MUR 7022 (Bernie 2016) (finding no reason to believe the federal candidate committee violated the disclaimer provisions by failing to include the approval/authorization or “paid for by” statement in the broadcast advertisement that satisfied the safe harbor provision for coordinated communications containing endorsements by federal candidates).